SUPREME COURT, U. S.

MAY 17 1969

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

——— Term, 19—

No. 1414

J. W. ANDERSON, ET AL., - - - Appellants,

versus

THE URBAN RENEWAL AND COMMUNITY DEVELOPMENT AGENCY OF THE CITY OF PADUCAH, KENTUCKY, - - - Appellee.

On Appeal from the Court of Appeals of the State of Kentucky.

JURISDICTIONAL STATEMENT.

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THE URBAN RENEWAL AND COMMUNITY DEVELOPMENT AGENCY OF THE CITY OF PADUCAH, KENTUCKY, - - - *Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

JURISDICTIONAL STATEMENT.

OPINIONS BELOW.

Final judgment of the Circuit Court of McCracken County, Kentucky, and the opinion of the Court of Appeals of Kentucky, dismissing Appellants' appeal from said final judgment are set forth in the appendix, *infra.*

JURISDICTION.

This suit was instituted pursuant to the provisions of Kentucky Revised Statutes Section 99.420, for an Order and Judgment condemning real property of Appellants under Chapter 99 of said Statutes. The Circuit Court of McCracken County (a court of original jurisdiction in the State of Kentucky) granted a final judgment in favor of the Appellee Agency on May 23, 1967, prior to which time Appellants challenged said Agency's right to take or condemn real property located in the Urban Renewal area at Paducah, Kentucky. After entry of said final judgment, Appellants filed a Notice of Appeal with the Court of Appeals of Kentucky, including the Designation of Content of Record on Appeal on June 1, 1967. The first question on appeal was whether the Appellee Agency may condemn private property for redevelopment where the taking of excess property was not for public use, but merely as an aid and assistance in obtaining a Federal grant. The second question on appeal was whether an aid in obtaining a Federal grant is tantamount to a necessity for the taking of excess property which was not considered in the original master plan of the Appellee Agency.

The Court of Appeals of the State of Kentucky dismissed said appeal on October 11, 1968, upon the grounds that the effect of KRS 99.420(14) is to deny an appeal challenging the Agency's right to condemn. Hence, the attempted appeal in this case was dismissed with Judges Steinfeld and Hill dissenting. Judge

Steinfeld in his dissenting opinion in *Cartwell* v. *Urban Renewal & Community Development Agency of Maysville,* Ky., 432 S. W. 2d 445, (decided October 4, 1968) stated that it is our conclusion that the effect of KRS 99.420(14) does not deny an appeal challenging the agency's "right to condemn", although said statute denies an appeal challenging the agency's "right to possession". The dissenting opinion further stated that a challenge of the right of the agency to condemn property for an Urban Renewal Project, and a suspension of the right of the agency to have possession are two entirely different matters. After dismissal of the appeal by the Court of Appeals of Kentucky, Appellants filed a Petition for Rehearing and for oral argument based upon the grounds and issues as hereinafter set forth. The Court of Appeals of Kentucky overruled the Petition for Rehearing on February 21, 1969, without an opinion.

Thereafter, Appellants filed their Notice of Appeal to the Supreme Court of the United States on March 19, 1969. Jurisdiction to review a judgment of the highest court of a state by appeal is conferred upon this Court by Title 28, U.S. Code of Sections 1257(2) and 2101(c); that, such jurisdiction exists in circumstances of this case as sustained by the following decisions: *City of Cincinnati* v. *Vester* (6th Cir.), 33 Fed. 2d 242, 68 A.L.R. 831, affirmed in 281 U. S. 439; and in *Carlsbad* v. *Ballard,* 71 N. M. 397, 378 P. 2d 814, 6 A.L.R. 3d 293; and in *Wilton* v. *St. Johns County,* 98 Fla. 26, 123 So. 527, 65 A.L.R. 488; and in *DePenning* v. *Iowa Power & L. Co.,* 239 Iowa 950, 33 N. W. 2d 593, 5 A.L.R. 2d 716.

STATUTE INVOLVED.

I. KENTUCKY REVISED STATUTES, Chapter 99.

Section 99.420(14), amended to Section 99.420(13) in 1968: "(13) An appeal may be taken by either party in interest from the circuit court to the Court of Appeals in the manner, for any of the causes and subject to the rules provided by general laws regarding appeals from circuit court to the Court of Appeals, but no appeal or supersedeas shall suspend the right of the agency to have possession of the property, easement or right-of-way condemned. Such appeals shall be advanced on the docket of the Court of Appeals. (1968 S 122, § 85. Eff. 6-13-68. 1960 c 109, § 1; 1958 c 159, § 4; 1956 c 215, § 9; 1950 c 119, § 11.)"

II. CONSTITUTION OF THE UNITED STATES.

ARTICLE XIV.

"Section 1 * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED.

(1) Whether the legislature can authorize the taking of property in excess of that required for the public use, such excess to be later sold or devoted to private use.

(2) Whether the condemnation of more property than needed for public use is a denial of due process.

(3) Whether the extent of that power is limited by the necessities of the particular public purpose or use for which the land is sought to be condemned.

(4) The decision, as it now stands, is based upon an erroneous theory of statutory construction which is contrary to the express language of the statutes in question.

(5) The Court's decision is contrary to the legislative intent as evidenced by the express language of the statutes in question, as it concerns the Court's jurisdiction on appeal of this case.

(6) The Court's decision fails to spell out whether or not a challenge of the Agency's "right to take" property for an urban renewal project, and a suspension of the Agency's "right to possession," are two entirely different matters for purposes of determining Appellants' right to an appeal from a final judgment of a lower Court adjudging the Agency's "right to take."

(7) Depending upon how this Honorable Court will decide the foregoing issues will necessitate the further spelling out of whether or not the denial of an appeal from a final judgment of a lower Court challenging the Agency's "right to take" Appellants' property is a clear violation of Appellants' constitutional and statutory rights under the constitutions of the United States and the Commonwealth of Kentucky, and Chapter 99 of the Kentucky Revised Statutes.

(8) The Court's decision has not made a determination of the issue on appeal as to whether or not the Agency has the right to take property in excess

of public needs, without establishing a necessity for its taking.

(9) The Court's decision has not made a determination of the issue on appeal as to whether or not an aid in obtaining a Federal grant is tantamount to a necessity for the taking of excess property.

(10) The Court's decision has not made a determination of the issue on appeal as to whether or not the condemnation of more property than needed for public use is a denial of due process under the constitution of the United States.

(11) The Court has reached a policy decision in this case, when and if the mandate issues, will become an unfortunate addition to the jurisprudence of this State and Nation.

STATEMENT.

This controversy involves the condemnation and taking for redevelopment of Appellants' parcel of land and improvements thereon located in the western one-half of Block 6 facing 3rd Street between Washington and Clark Streets in the City of Paducah, McCracken County, Kentucky, situated in a light industrial area. A sheet metal shop is presently being operated by Appellants under the trade name of National Sheet Metal Works, 329 South 3rd Street. The condemned parcel of land is 66.5 feet facing 3rd Street and extending 173.3 feet to the rear of the area in question. Said parcel of land is one of four lots in this area in question being parcels 10 through 14, the remaining eastern one-half of said block facing 4th

Street condemned by the Appellee Agency herein for public use.

In the area in question, another one of the remaining three lots and improvements thereon is a business known as Helm's Hatchery, which is located at the corner of 3rd and Washington Streets and excluded from condemnation for reasons unknown to Appellants. The remaining two vacant lots are adjacent to both sides of Appellants' property and are being likewise condemned and to be offered together with Appellants' property to private interests for private redevelopment.

Appellants' property was offered for sale to a one Ernest P. Hannin, and a one Charles Turner and others for re-development in the area in question by the former Executive Director of the Urban Renewal and Community Planning Agency, R. H. Overstreet.

The lower Court made its findings of fact, set forth its conclusions of law and judgment, all of which are set forth verbatim in Appendix "A" of this brief.

Appellants complained on appeal of the lower Court's findings that nowhere in the record had Appellee established the necessity for the taking of excess property for development for public use, other than to offer such excess to private interests for private development. The area in question consisting of parcels 10 through 14 in Block 6 were acquired primarily for "disposal purposes", according to the evidence on trial.

THE QUESTIONS ARE SUBSTANTIAL.

This appeal presents important constitutional questions affecting the property rights of the citizens of the United States.

The Court of Appeals of Kentucky Has Reached a Policy Decision in This Case Which, When and if the Mandate Issues, Will Become an Unfortunate Addition to the Jurisprudence of This State.

It is inescapably true that the Court of Appeals of Kentucky in this case has reached a policy decision. This statement is made with respect to the observation of the Court's opinion on page 3, to wit:

> "It was determined in *Cartmell* v. *Urban Renewal and Community Development Agency of Maysville, Kentucky,* 432 S. W. 2d 445 (decided October 4, 1968), the third opinion delivered by this Court in that particular litigation, that *the effect* of KRS 99.420(14) is to deny an appeal challenging the Agency's right to condemn." (Emphasis supplied.)

Appellants respectfully argue that they are not challenging the Agency's constitutional or statutory "right to possession" and neither is it Appellants' position that they could delay the actual process of condemnation through an appeal, thus depriving the Agency of immediate possession of the property so condemned. However, the inference drawn by the Court in the foregoing opinion as to the *effect* of KRS 99.420 (14) results in a policy which is contrary to law.

In view of *Cartmell* v. *Urban Renewal and Community Development Agency of Maysville, Kentucky,* 432 S. W. 2d 445 (decided October 4, 1968), which is the third opinion delivered by the Court of Appeals of Kentucky in that particular litigation and which has been cited in the opinion of this case as a basis for its dismissal of Appellants' appeal, Appellants respectfully state the issues involved in those decisions, respectively, as follows:

1. In the decision cited at 419 S. W. 2d 719 (October 20, 1967), the issue was whether an appeal is available *before a final judgment* of a lower Court is entered;

2. In the decision cited at 430 S. W. 2d 649 (June 14, 1968), the issue was whether it was error to refuse to continue an *injunction* against the Agency *taking possession* of condemned property *pending an appeal;* and

3. In the Court's decision as it now stands on October 4, 1968, the issues were whether an interlocutory judgment, once entered, will preclude the Agency's *"right of immediate possession"* with full, complete use and control of the property so condemned, and, whether the language of KRS 99.420(14) precludes an appeal testing the propriety of the Circuit Court's ruling upholding the Agency's *"right to take."*

The Court's Decision Is Contrary to the Legislative Intent as Evidenced by the Express Language of the Statutes in Question, as it Concerns the Court's Jurisdiction on Appeal of This Case.

The statute (KRS 99.420(14)) states:

> "An appeal may be taken by either party in interest from the Circuit Court to the Court of Appeals in the manner, *for any of the causes* and subject to the rules provided by general laws regarding appeals from Circuit Court to the Court of Appeals, but no appeal or supersedeas shall *suspend the right of the Agency to have possession* of the property, easement or right-of-way condemned. *Such appeals shall be advanced on the docket of the Court of Appeals.*" (Emphasis supplied.)

The Court of Appeals of Kentucky states, contrary to the express language in the foregoing statute, in its opinion in the Cartmell case, *supra,* decided October 4, 1968:

> "We think the *quick taking device* afforded by the statute would be frustrated and without meaning if KRS 99.420(14) were to be construed as permitting an ultimate Appellate review of the Circuit Court's actions in deciding the issues touching the question of the right to take." (Emphasis supplied.)

It is Appellants' contention that the express language in the foregoing statute deals with the suspension of the Agency's "right to immediate possession," which is completely and entirely a different

matter from questioning the merits of the Agency's "right to take" Appellants' property.

Appellants do not accept the Court's theory that the legislature of the State of Kentucky, by allowing the Agency to a statutory right to immediate possession, intended to side-step a property owner's property rights, nor did they intend to preclude a property owner of this State to challenge, on appeal, the taking of his property where the merits of the taking are questionable at the outset.

Briefly, looking at the statute, it clearly states that one cannot appeal for certain causes, yet, on the other hand, it appears that one may appeal for other causes. In view of the fact that the statute states "for any of the causes," what type of case or what issues must be involved in order to fall into a category which may be appealed from the Circuit Court to the Court of Appeals? Surely, the rights to the ownership of property would be a cause and what cause is more important to an individual than his property rights. The decision rendered in the Cartmell case, *supra*, wherein the appeal was dismissed as in Appellants' case, was based upon the Court's theory that the legislature did not want to hinder or delay the use and possession of property that was condemned and which had been adjudicated in a proceeding in the Circuit Court resulting in a final judgment. They felt that once it had been adjudicated in the Circuit Court, no appeal should be granted because this would further delay the *taking* and the *possession* of the property. However, let's look at the real intent of the statutes. If the

legislature had the intent to prevent the delay, they would have specifically stated that no appeal may be taken *for any cause* from a final judgment of a Circuit Court.

As a reminder to this Honorable Court, the *Anderson* case is not an appeal from the right of possession, but that it is an appeal from the right of ownership, or right of taking. Now, if the legislative intent was to preclude an appeal determining the right of ownership from a final judgment of a Circuit Court, why did the legislature place the following express language in the last sentence of KRS 99.420(14), to wit:

> "Such appeals shall be advanced on the docket of the Court of Appeals."

This is the express language that the Kentucky Court of Appeals has overlooked. What does the legislature mean by stating that such appeals shall be advanced on the docket? First of all, what appeals are they talking about? Obviously, it cannot be an appeal from a right to possession because the statute specifically states:

> "But no appeal or supersedeas shall suspend the right of the Agency to have possession of the property, easement or right-of-way condemned."

Then, what is the legislature talking about? It obviously must be talking about an appeal from a final judgment adjudging one's right of ownership to property. And, the reason for the express language that, "*such appeal shall be advanced on the docket of the*

Court of Appeals," is specifically *to prevent delay of the right of taking.* It is Appellants' contention that the intent of the legislature where it concerns subsection 14 is to clearly prevent delay not only to the right of possession, but also to prevent delay to the right of ownership or the right of taking. They both must not be delayed. How has the legislature specifically expressed this in the statute? Very simple. *An appeal may be taken from the Circuit Court to the Court of Appeals for any cause but no appeal shall suspend the right of possession.* They are concerned with both rights, *yet the right to possession shall not be granted an appeal but the right of ownership shall.* If this is not true, then what type of an appeal are they talking about? What would be the grounds for an appeal? What does that statute mean? If we are to follow the Cartmell decisions, then the legislature should change the language of the statute and state that *no appeal shall be granted for any cause.*

Appellants respectfully direct the attention of this Honorable Court to KRS 99.420(9), which in essence concerns the right of the Agency to obtain an interlocutory judgment prior to the entering of a final judgment. This interlocutory judgment under subsection 9 grants immediate possession to the Agency with full and complete control of the property sought to be condemned, including the right to remove, demolish, raze and do away with all buildings, structures, appurtenances thereon or thereto belonging, without hinderance, interruption or interference by anyone, as if title had been conveyed to it.

It is Appellants' contention that subsection 9 has given the Agency the "right to possession" as if it was its own, however, subsection 9 does not state, express or implied, that the property to be so used and controlled is actually owned in fee simple by the Agency. The purpose of this subsection is to prevent any delay in obtaining possession of the property so condemned. Nothing within subsection 9 determines the rights of ownership of the property condemned.

In KRS 99.420(8), subsection 8 states in essence that upon final determination of all issues raised, either by answer or other pleading or by exceptions to the report in the award of commissioners, or if no answer, pleadings or exceptions, be filed by any of the parties, the Court shall forthwith enter a judgment which shall be a final judgment and shall make such orders as are necessary and proper for the conveyance of the land, property and rights, if any, to the Agency, upon payment into Court through the Clerk of the Circuit Court by the Agency of the amount set forth in the judgment of the Court vesting in the Agency absolute fee simple title to the land.

In contrast, subsection 9 does not mention "absolutely and in fee simple," which means that the intent of that subsection is only to give *possession*, but *not title*. In view of this, Appellants respectfully remind the Court that their case was dismissed because of the Court's construction of subsection 9 and subsection 14 of KRS 99.420, concerning itself strictly on the procedural aspects rather than the merits of the case.

The Court's decision in the Cartmell case, *supra,* (October 4, 1968) stated as follows:

> "The narrow question now is whether the language of KRS 99.420(14) precludes an appeal testing the propriety of the Circuit Court's ruling upholding the Agency's right to take. It is our conclusion that the effect of KRS 99.420(14) is to deny an appeal challenging the Agency's right to condemn. We have observed that once the Circuit Court affords a hearing and renders a judgment sustaining the Agency's right to condemn, the interlocutory judgment is then appropriate. It is apparent that the intent of KRS 99.420(9) is to enable expeditious action in the matter of proceeding with the development of property taken in cases processed under KRS Chapter 99. We think the quick taking device afforded by the statute would be frustrated and without meaning if KRS 99.420(14) were to be construed as permitting an ultimate Appellate review of the Circuit Court's actions in deciding the issues touching the question of the right to take. It could hardly be supposed that an Agency would or could proceed with development of an area in which there remained the lurking doubt as to the ultimate right of the Agency to acquire the property. It follows that the appeal which has been undertaken in the present proceeding is one over which we have no jurisdiction."

Appellants disagree with the foregoing decision upon grounds that the Court has not analyzed subsection 8 in contrast with subsection 9 and more im-

portant, in contrast with subsection 14, more specifically the language contained therein, to wit:

> "Such appeals shall be advanced on the docket of the Court of Appeals."

Appellants urge that the foregoing language spells out the legislative intent.

In view of the fact that it is Appellants' contention that the Court of Appeals of Kentucky has jurisdiction in this case evidenced by the construction of the legislative intent as spelled out herein, Appellants respectfully reiterate that the Circuit Court based its erroneous decision upon the case of *Miller* v. *City of Louisville,* 312 S. W. 2d 237, which ruled upon issues that they have absolutely nothing to do with Appellants' case, those being (1) whether Urban Renewal and Urban Development are proper objectives of government; (2) whether tax monies may be spent for them; (3) whether the power of eminent domain may be brought to bear in furtherance of them; and (4) whether the statutes attempt improper delegation of legislative power.

Appellants argued the merits germaine to the issues of their case on appeal (Right to Condemn in Excess of Public Needs) based upon the line of cases under *McGee* v. *City of Williamstown,* 308 S. W. 2d 795 and *City of Cincinnati* v. *Vester* (6th Circuit), 33 Fed. 2d 242, 68 A. L. R. 831, affirmed by the Supreme Court of the United States in 281 U. S. 439, and upon the merits germaine to the issues of their case on appeal (Denial of Due Process) based upon *Carlsbad* v. *Ballard,* 71 N. M. 397, 378 P. 2d 814, 6 A. L. R. 3d 293.

Denial of Due Process.

The Court of Appeals of Kentucky has already spoken in the case of *McGee* v. *City of Williamstown,* 308 S. W. 2d 795 (October 4, 1957, rehearing denied January 31, 1958), wherein it held:

> "It is a general principle of law that the Legislature cannot authorize the *taking of property* by eminent domain in excess of the particular public need involved. However, the limitation upon the amount of property to be condemned for an acknowledged public improvement may not be based solely upon present conditions and requirements but a municipality may also procure land in contemplation of such reasonable necessity as may arise in the future. * * *" (Emphasis supplied.)

And in the case of *City of Cincinnati* v. *Vester* (6th Cir.), 33 Fed. 2d 242, 68 A. L. R. 831, affirmed in 281 U. S. 439, the Court held:

> "It is a general principle that the Legislature cannot authorize the *taking of property* in excess of that required for the public use, *such excess to be later sold or developed to private use.*" (Emphasis supplied.)

And in the case of *Carlsbad* v. *Ballard,* 71 N. M. 397, 378 P. 2d 814, 6 A. L. R. 3d 293, it held:

> "Condemning more property than needed for a public use *is held to be a denial of due process.*" (Emphasis supplied.)

CONCLUSION.

The inference drawn by the Court in the Cartmell decision, *supra,* October 4, 1968, is contrary to the legislative intent as evidenced by the express language in the Kentucky Revised Statutes, *supra,* as it concerns an appeal challenging the Agency's "right to take." To deny an appeal to a property owner of this state, based upon the inference that the statutory intent is to preclude an individual to question the merits of the taking of his property by any Governmental Agency, body or otherwise, would be a clear violation of his constitutional rights under the Constitution of the United States.

Moreover, the Court's decision, as it now stands, is contrary to its previous decision in the McGee case, *supra,* and if not reversed, will create the inference that inasmuch as subsection 14 gives the Agency a statutory right to immediate possession, the Court is not concerned with the merits of the Agency's right to take at the outset, irrespective of the facts and circumstances in the case.

Appellants respectfully request a rehearing of this case by oral arguments in the interest of preserving the constitutional and property rights of the citizens of the State of Kentucky.

Respectfully submitted,

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CERTIFICATION OF SERVICE.

It is hereby certified that the foregoing Jurisdictional Statement has been served upon the opposing counsel by mailing a true copy thereof, postage prepaid, to Roy Vance, Esquire, Attorney at Law, Paducah, Kentucky, and to the Honorable C. Warren Eaton, trial judge, Paducah, Kentucky, and to each of the judges of the Court of Appeals of Kentucky, Frankfort, Kentucky.

This the _____ day of May, 1969.

MICHAEL AVEDISIAN,
Attorney for Appellants.

APPENDIX

APPENDIX

COURT OF APPEALS OF KENTUCKY

Rendered: October 11, 1968

J. W. ANDERSON, ET AL., - - - - *Appellants,*

v.

THE URBAN RENEWAL AND COMMUNITY DEVELOPMENT AGENCY OF THE CITY OF PADUCAH, KENTUCKY, - - - - *Appellee.*

Appeal from McCracken Circuit Court,
Hon. C. Warren Eaton, Judge.

OPINION OF THE COURT BY SPECIAL COMMISSIONER SCOTT REED DISMISSING APPEAL.

This is an appeal from an order adjudging that the Urban Renewal Agency of Paducah has a right to condemn real property owned by the appellants.

The Agency, appellee herein, brought suit in the McCracken Circuit Court pursuant to KRS Chapter 99. The appellants maintained that their property was not properly located in the redevelopment project area and that appellee had no right to condemn and take their property. Both the landowners and the Agency excepted to the appraisal made by the commissioners appointed by the circuit court. The land-owners raised the right of the Agency to condemn the property by an affirmative defense in an answer filed. By agreement of the parties a hearing was held solely on the question of whether the taking was for a public or private purpose. The trial court filed find-

ings of fact and conclusions of law and entered an order adjudging that the Agency had a right to condemn the property. Pursuant to CR 54.02 the order was made a final judgment. Apparently no further proceedings were taken in the case to try out the issue of damages, and appellants prosecuted an appeal from the order adjudging the right of the appellee to condemn and take the property.

The proceedings from which the order appealed from resulted were held pursuant to KRS 99.420(9), which provides that after legal requirements specified in the statute are met, including the payment of the amount of the commissioners' award into court, an interlocutory judgment granting and awarding to the Agency immediate possession shall be entered.

KRS 99.420(14) provides that an appeal may be taken by either party in interest from the circuit court to the Court of Appeals in the manner, for any of the causes and subject to the rules provided by general laws regarding appeals from circuit courts to the Court of Appeals. But this section of the statute specifically provides that no appeal or supersedeas shall suspend the right of the Agency to have possession of the property, easement or right-of-way condemned. It further provides that such appeal shall be advanced on the docket of the Court of Appeals. Thus it appears that the proceedings with which we are here dealing are statutory proceedings and the Legislature has clearly stated its intent to protect public or quasi-public projects which are the subject matter of the statute against delays even though the rights of the condemnee remain in litigation. Note that the order provided for by KRS 99.420(9) allowing possession of the property by the condemnor is specifically described as "interlocutory." Note also that KRS 99.420(14) specifically provides that no appeal or supersedeas shall suspend the right of the Agency to have possession of the property.

It was determined in Cartmell v. Urban Renewal & Community Development Agency of Maysville, Ky., ____ S. W. 2d ____ (decided October 4, 1968), the third opinion delivered by this court in that particular litigation, "that the effect of KRS 99.420(14) is to deny an appeal challenging the agency's right to condemn." Hence the attempted appeal in this case must be dismissed.

Appeal dismissed.

Montgomery, C. J., and Milliken and Osborne, JJ., concur.

Hill and Steinfeld, JJ., dissent.

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APPENDIX A

McCRACKEN CIRCUIT COURT

Civil Action No. 7713

THE URBAN RENEWAL AND COMMUNITY DEVELOPMENT AGENCY OF THE CITY OF PADUCAH, KENTUCKY, - - - - - *Plaintiff,*

v.

J. W. ANDERSON, ET AL., - - - - *Defendants.*

FINDINGS OF FACT, CONCLUSION OF LAW AND JUDGMENT.

This matter coming on for hearing on the 11th day of May, 1967, and both parties by counsel having appeared and announced ready for trial and the Court having heard evidence offered by the parties and being sufficiently advised, now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACTS.

The plaintiff, Urban Renewal and Community Development Agency of the City of Paducah, Kentucky, hereinafter referred to as the "Agency," is a duly appointed and properly constituted Agency pursuant to KRS 99.350 having powers and duties conferred by KRS 99.330 to 99.590. The Agency has adopted an Urban Renewal project Ky. R-30 which project has also been approved and adopted by the City Council of Paducah. The area encompassed by the

project includes real property owned by the defendants, J. W. Anderson and his wife, Pauline Anderson. The Agency has instituted this action to obtain the defendants' property by eminent domain.

By their Answer, the defendants have challenged the right of the Agency to condemn the property. As provided by statute, this question must be determined before any other steps may be taken in the action.

The parties have agreed, as noted in the previous Order, that the Agency has complied with all of the requirements of Kentucky Statutes relating to the acquisition of this property by eminent domain. The contention of the defendants is that the taking by the Agency is for a private purpose rather than a public purpose. The parties have agreed that the issue concerning the right of the Agency to condemn the defendants' property is to be limited to the question of whether or not the taking is for a public or a private purpose.

The area encompassed by Urban Renewal Project Ky. R-30 is a blighted and deteriorating area. More than one-half (½) of the buildings thereon failed to meet the requirements of the Housing Code. The building upon the defendants' property was dilapidated and in a state of general disrepair when Project R-30 was adopted.

Project Ky. R-30 is designated as a civic center project. The property acquired is to be used for a city hall (already acquired and constructed), a public plaza between the city hall and county courthouse; a public library building and public parking facilities. A small portion of the property to be acquired (which includes the defendants' property) is to be replatted into larger lots and resold for private development. The inclusion of the defendants' property with the boundaries of Project Ky. R-30 was necessary in the first place to obtain approval of the Project for a Federal Grant. It also serves the purpose of extending the boundaries of the Project to a natural boundary, to-wit:

South 3rd Street. The omission of the property of the defendant from this Project, even if Federal Grants could have been obtained, would have left an unsightly, blighted and deteriorated property standing adjacent to the Civic Center and would have greatly detracted therefrom.

CONCLUSIONS OF LAW.

The Court concludes that a City of the second class has authority by Statute to designate blighted and deteriorating areas as Urban Renewal project and has the right to acquire the property therein by eminent domain. The area encompassed by Project Ky. R-30 was such a blighted and deteriorated area. In such areas it is difficult to persuade individual property owners to upgrade their individual property when they are surrounded by substandard and blighted and deteriorating areas. The acquisition of such entire areas and the demolition of structures thereon by an Urban Renewal Agency is a public purpose even though all or a part of the property is subsequently offered for sale for private development. *Miller* v. *City of Louisville,* 321 S. W. 2d 237.

Wherefore, it is adjudged that the Urban Renewal and Community Development Agency of the City of Paducah, Kentucky, has a right to condemn the property sought to be taken by this action. It is further adjudged that there is no just reason for delay in granting a final Judgment upon this claim and that the foregoing Judgment adjudicating the right of the Agency to condemn the property of the defendants is hereby declared to be a final Judgment.

Entered this 23rd day of May, 1967.

/s/ C. Warren Eaton,
Judge, McCracken Circuit Court.

Received and filed May 23, 1967:
Alfred Obermark, *Clerk,*
By /s/ Lena Gleaves, *D. C.*

UPREME COURT U. S.

JUN 9 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1414

J. W. ANDERSON, et al - - - - - - - Appellants

versus

THE URBAN RENEWAL AND
COMMUNITY DEVELOPMENT AGENCY
OF THE CITY OF PADUCAH, KENTUCKY Appellee

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF KENTUCKY

Motion to Dismiss Appeal, or in the Alternative, to affirm the Judgment of the Court of Appeals of Kentucky

ROY N. VANCE, JR.
310 Citizens Bank Building
Paducah, Kentucky
Attorney for Appellee

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Supreme Court of the United States

OCTOBER TERM
1969

No. 1414

J. W. ANDERSON, ET AL APPELLANTS

VS.

THE URBAN RENEWAL AND COMMUNITY DEVELOPMENT AGENCY OF THE CITY OF PADUCAH, KENTUCKY APPELLEE

On Appeal From the Court of Appeals of the State of Kentucky

MOTION TO DISMISS THE APPEAL HEREIN, OR IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT OF THE COURT OF APPEALS OF KENTUCKY.

The Appellee moves the Court to dismiss the appeal herein, or in the alternative, to affirm the Judgment of the Court of Appeals of Kentucky upon the following grounds:

1. This appeal does not present a substantial federal question.

2. The questions sought to be reveiwed herein were not timely or properly raised and were not expressly passed on below.

3. The appeal is not within the jurisdiction of this Court because it has not been taken in conformity with the Rules of the Supreme Court of the United States.

NATURE OF THE CASE

This case involves an eminent domain proceeding instituted in the Circuit Court of McCracken County, Kentucky (a Court of original jurisdiction in Kentucky) in which the landowner has challenged the right of the condemnor to take the property involved. By agreement of the parties, the issue concerning the right to condemn was limited to the question of whether or not the taking was for a public purpose. (This agreement is reflected in the Findings of Fact of the McCracken Circuit Court set forth in Appendix A of Appellants' Jurisdictional Statement on Page 25).

The McCracken Circuit Court afforded the landowner a trial upon the issue of the right to take and entered a Judgment that the condemnor had a right to take the property it sought to condemn.

The landowner appealed to the Court of Appeals of Kentucky from this Judgement and the Court of Appeals of Kentucky dismissed the appeal upon the grounds that Kentucky Revised Statute 99.420 (13), denies an appeal from a Judgment of a Circuit Court adjudicating the right to condemn property in actions instituted under Chapter 99 of the Kentucky Revised Statutes. (The opinion of the Kentucky Court of Appeals is set forth in full in Appendix A to Appellants' Jurisdictional Statement, Pages 21-23.)

ARGUMENT

THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The Judgment of the Kentucky Court of Appeals which is appealed from holds only the Kentucky Revised Statute 99.420 (13) denies the right to an appeal to the Court of Appeals of Kentucky from a ruling of a Kentucky Circuit Court adjudicating the right to condemn property in any proceeding instituted under Chapter 99 of the Kentucky Revised Statute.

In his Jurisdictional Statement (Page 5) Appellant raises the question of whether the denial of an appeal violates his constitutional rights.

In many cases, this Court has held that appellate review is not a matter of right but of grace and that the right of appeal is not essential to due process. *Kane vs. Durston*, 153 U.S. 684, 38 L. Ed. 867; *Ohio Ex Rel. Bryant vs. Akron Metropolitan Park District*, 281 U.S. 74, 74 L. Ed. 710; *Luckenbach Steamship Company, Inc. vs. United States*, 272 U.S. 533 71 L. Ed. 394.

The contention of appellant (set forth in questions 4, 5, 6 of his Jurisdictional Statement) that the Court of Appeals of Kentucky has misconstrued the language of the Statute and that the Statute does not in fact deny an appeal involves a matter of procedure in the Kentucky Courts and does not involve a federal question at all. In the light of the unbroken series of cases of this Court holding that the right of appeal is not essential to due process, the appellants' contention that the denial of his

right to appeal from the McCracken Circuit Court to the Court of Appeals of Kentucky deprived him of due process of law does not present any substantial federal question.

II

THE QUESTIONS SOUGHT TO BE REVIEWED BY APPELLANT WERE NOT PROPERLY OR TIMELY RAISED NOR EXPRESSLY PASSED ON BY THE COURTS BELOW

The appellant lists seven questions in addition to the four discussed hereinabove which he claims are presented for review on this appeal. (Appellants' Jurisdictional Statement pages 4-6).

The Jurisdictional Statement did not comply with rule 15 paragraph 1d of the rules of this Court by specifying at what stage of the proceedings and the manner in which these questions were raised in the courts below or the manner in which they were expressly passed upon.

The appellee believes that none of the questions claimed by appellant to be reviewable upon this appeal were timely or properly raised or expressly passed upon in the courts below except the question of whether the denial of an appeal denies due process.

The only question presented to the Circuit Court was whether the taking was for a public purpose. There was an express holding of the Circuit Court that the taking was for a public purpose.

On appellants' appeal from that Judgment of the Court of Appeals of Kentucky, Appellants attempted to expand the issues as follows:

> "The first question in issue is whether the appellee may condemn private property for redevelopment where the taking of express property was not for public use, but merely as an aid and assistance in obtaining a federal grant."
>
> "The second question in issue is whether an aid in obtaining a federal grant is tantamount to a necessity for the taking of excess property which was not considered in the original master plan of the appellee herein."
>
> (See Statement of questions presented—Appellants' Brief to the Court of Appeals of Kentucky).

These questions were not properly raised in the Circuit Court nor properly reviewable by the Court of Appeals of Kentucky.

Now in this Court, the appellant has expanded the questions presented to a total of eleven. These precise questions have not been properly presented not expressly passed upon in the courts below.

The precise questions which appellant seeks to have reviewed are as follows:

> Question 1: "Whether the legislature can authorize the taking of property in excess of that required for the public use, such excess to be later sold or devoted to private use."

No pleading in this case touches upon the right of a legislature to authorize the taking of property in excess of that required for the public use. No part of any Judgment herein purports to uphold any such legislative action.

Question 2: "Whether the condemnation of more property than needed for public use is a denial of due process."

This question was not raised in the lower court and the judgment in this case does not uphold the condemnation of more property than needed for a public use.

The public purpose in this case is the elimination of a blighted area and the appellants' property was found to be a part of the blighted area.

Question 3: "Whether the extent of that power is limited by the necessities of the particular public purpose or use for which the land is sought to be condemned."

Appellee does not believe that this question has ever been put directly in issue nor expressly passed upon by any Court in this case.

Questions 4, 5, 6, and 7 have been discussed hereinabove as not being substantial federal questions.

Question 8: "The Court's decision has not made a determination of the issue on appeal as to whether or not the Agency has the right to take property in excess of

public needs, without establishing a necessity for its taking."

Question 9: "The Court's decision has not made a determination of the issue on appeal as to whether or not an aid in obtaining a Federal grant is tantamount to a necessity for the taking of excess property."

Question 10: "The Court's decision has not made a determination of the issue on appeal as to whether or not the condemnation of more property than needed for public use is a denial of due process under the constitution of the United States."

These are not questions at all but merely statements and each statement shows on its face that it involves a matter not expressly passed on in the courts below. As shown by the discussion relative to questions 1 and 2 herein, these points were not properly raised in the courts below.

Question 11: "The Court has reached a policy decision in this case, when and if the mandate issues, will become an unfortunate addition to the jurisprudence of this State and Nation."

To the appellee, this does not appear to be a question and certainly not one which has been either properly raised or expressly passed upon in this litigation.

III

THIS APPEAL SHOULD BE DISMISSED BECAUSE THE APPELLANT HAS NOT COMPLIED WITH PARAGRAPH 1 OF RULE 12 AND PARAGRAPH 1d OF RULE 15 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 12, paragraph 1, of the Rules of this Court requires that a party intending to appeal shall transmit the entire record in the Court from which the appeal is taken unless the parties agree that specified parts of the record may be omitted as unnecessary for the determination of the appeal.

The Appellant herein did not request the entire record to be transmitted and he has omitted from the record the transcript of evidence of the trial in the McCracken Circuit Court and various Orders of that Court setting forth the agreements of the parties limiting the issues. These portions of the record are material and necessary to the determination of the appeal and there was no agreement of parties that these portions of the record should be omitted.

The transcript of evidence would establish that the appellant was accorded full and fair judicial hearing on the question of the right of the condemnor to take the property of the appellant.

Rule 15, paragraph 1d requires the appellant in the Jurisdictional Statement to provide a statement of the case which specifies the state in the proceedings in the Court of first instance, and in the Appellate Court at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them; and the

way in which they were passed upon by the Court; with such pertinent quotations or specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears as will support the assertions that the rulings of the Court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this Court.

In the Jurisdictional Statement submitted by appellant, there is listed eleven questions claimed to be presented for review by this appeal.

The appellant has not complied with paragraph 1d of Rule 15 by specifying the stages in the proceedings or the manner in which any of the questions were raised in the Court of first instance or the Appellate Court and has not shown the manner in which these questions were raised nor the way in which these questions were passed upon.

CONCLUSION

For all of the foregoing reasons, the appellee respectfully submits that this appeal should be dismissed, or in the alternative, the Judgment of the Court of Appeals of Kentucky should be affirmed.

Respectfully submitted,

ROY N. VANCE, JR.
310 Citizens Bank Building
Paducah, Kentucky

ATTORNEY FOR
APPELLEE

CERTIFICATION OF SERVICE

It is hereby certified that the foregoing Motion to Dismiss the Appeal or in the Alternative to Affirm the Judgment of the Court of Appeals of Kentucky has been served upon the opposing counsel by mailing a true copy thereof, postage prepaid, to Michael Avedisian, Esquire, and Andrew H. Avedisian, Esquire, Attorneys at Law, 1200 Broadway, Paducah, Kentucky, and to the Honorable C. Warren Eaton, trial judge, Courthouse, Paducah, Kentucky, and to each of the judges of the Court of Appeals of Kentucky, Frankfort, Kentucky.

THIS the day of May, 1969.

ROY N. VANCE, JR.

ATTORNEY FOR
APPELLEE

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

ANDERSON ET AL. *v.* URBAN RENEWAL & COMMUNITY DEVELOPMENT AGENCY OF PADUCAH, KENTUCKY.

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

No. 1414. Decided June 23, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.